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September 20, 2010

E-Filing

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW  
Washington, District of Columbia 20423-0001

ENTERED  
Office of Proceedings

SEP 20 2010

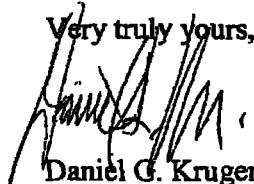
Print  
Public Record

Re: STB Finance Docket No. 35246, James Riffin – Acquisition and  
Operation Application – Veneer Spur – In Baltimore County, MD

Dear Ms. Brown:

I attach for electronic filing Norfolk Southern Railway Company's Reply and Motion to Dismiss, submitted in response to James Riffin's Opposition to Norfolk Southern's Motion to Dismiss, Notice of Appeal, and Supplement to Notice of Appeal in the subject proceeding, filed September 15, 2010.

Very truly yours,



Daniel G. Kruger

Attachment

cc: Service List

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35246**

**JAMES RIFFIN – ACQUISITION AND OPERATION APPLICATION –  
VENEER SPUR – IN BALTIMORE COUNTY, MD**

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**REPLY AND MOTION TO DISMISS  
OF NORFOLK SOUTHERN RAILWAY COMPANY  
IN RESPONSE TO  
JAMES RIFFIN'S OPPOSITION TO NORFOLK SOUTHERN'S MOTION TO DISMISS,  
NOTICE OF APPEAL, AND SUPPLEMENT TO NOTICE OF APPEAL,  
FILED SEPTEMBER 15, 2010**

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**Attorney for  
Norfolk Southern Railway Company**

**Dated: September 20, 2010**

Before the  
Surface Transportation Board

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STB Finance Docket No. 35246

James Riffin – Acquisition and Operation Application –  
Veneer Spur – In Baltimore County, MD

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REPLY AND MOTION TO DISMISS  
OF NORFOLK SOUTHERN RAILWAY COMPANY  
IN RESPONSE TO  
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NOTICE OF APPEAL, AND SUPPLEMENT TO NOTICE OF APPEAL,  
FILED SEPTEMBER 15, 2010

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Norfolk Southern Railway Company ("NSR") is in receipt of James Riffin's Opposition to Norfolk Southern's Motion to Dismiss, Notice of Appeal, and Supplement to Notice of Appeal in the subject proceeding, filed September 15, 2010 ("Riffin Reply"). In that pleading, Mr. Riffin averred that NSR "failed to read" portions of 49 C.F.R. § 1011.7(a),<sup>1</sup> "only selectively read" 49 C.F.R. § 1011.2(a)(7), and alleged that NSR and its attorney thereby violated 49 C.F.R. § 1103.27 ("Candor and fairness in dealing with other litigants") and Federal Rule of Civil

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<sup>1</sup> Note that both NSR, and also, apparently, Mr. Riffin, have previously cited to 49 C.F.R. § 1011.7(b) in discussing the scope of authority delegated by the Surface Transportation Board ("Board") to the Director of the Office of Proceedings. However, pursuant to Removal of Delegations of Authority to the Secretary, STB Ex Parte No. 685 (STB served Oct. 15, 2009) (corrected in 75 Fed. Reg. 30711 (June 2, 2010) ("Surface Transportation Board; Removal of Delegations of Authority to the Secretary")), the source of the Director's delegated authority was shifted to 49 C.F.R. § 1011.7(a) effective on June 2, 2010. NSR's improper citation was inadvertent. The change in § 1011.7 does not, however, alter the effect of the regulations as they have been discussed by the litigants in this proceeding. Unless quoting from an earlier pleading, NSR shall henceforth cite to § 1011.7(a), rather than to § 1011.7(b), when referencing the Director's delegated authority.

Procedure 11(b) (“Representations to the Court”). Riffin Reply ¶¶ 7, 8, 14. Mr. Riffin further averred that the Surface Transportation Board (“Board”) “has the authority to sanction NSR and its attorney, Daniel Kruger,” and that “[a]n appropriate sanction would be an admonishment to Mr. Kruger and NSR to read all applicable statutes and regulations in their entirety, carefully, and to stop misrepresenting what cited statutes, regulations, and cases actually say.” Riffin Reply ¶ 16.<sup>2</sup>

NSR respectfully submits to the Board that sanctions are unwarranted in this instance. Mr. Riffin’s sanctions request is based upon his incorrect assumption that NSR intentionally misrepresented the procedural facts of this proceeding and selectively read the regulations by arguing that his September 8, 2010 Notice of Appeal was untimely. Indeed, Mr. Riffin asserts in his September 15 Reply that NSR “argued that the Director ‘issued the August 18 Decision *pursuant to her delegated authority in 49 C.F.R. § 1011.7(b)*,’” Riffin Reply ¶ 2 (emphasis in the original), and thus that Mr. Riffin’s Notice of Appeal had to be filed within the ten (10) day period specified in 49 C.F.R. § 1011.2(a)(7). However Mr. Riffin’s characterization of NSR’s argument, and his suggestion that NSR has attempted to mislead the Board as to the contents of the agency’s own regulations, is incorrect.

NSR recognized that the Director had issued the August 18 Decision in this proceeding, and further recognized that the authority of the Director to issue any decision is based on the delegation of authority to her by the Board. The Director’s pertinent delegation now appears in 49 C.F.R. § 1011.7(a). It was for this reason that NSR qualified its September 10, 2010 Motion

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<sup>2</sup> Interestingly, Mr. Riffin also supplemented his own Notice of Appeal, filed September 8, 2010, by incorporating the regulatory issue raised by NSR in the very pleading that he claims should be the basis for sanctions. See Riffin Reply ¶ 11.

to Dismiss by stating that, "[t]o the extent that the Director of the Office of Proceedings issued the August 18 Decision pursuant to her delegated authority in 49 C.F.R. § 1011.7(b) [sic], Mr. Riffin's Notice of Appeal is untimely." (Emphasis added.) NSR made no representation as to whether the Director had in fact acted within the confines of 49 C.F.R. § 1011.7(a). NSR thus cogently argued that, only to the extent that Mr. Riffin appealed from a Decision of the Director rendered pursuant to authority delegated under 49 C.F.R. § 1011.7(a), his appeal was barred by the time limit in 49 C.F.R. § 1011.2(a)(7) and should be dismissed.

NSR therefore submits this Reply for clarification, and again moves that the Board dismiss Mr. Riffin's Notice of Appeal to the extent that the Director issued her August 18 Decision pursuant to her delegated authority in 49 C.F.R. § 1011.7(a).

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY

By: \_\_\_\_\_

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Dated: September 20, 2010

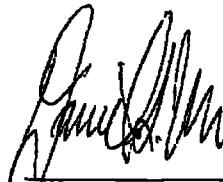
# CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2010, I caused to be served a copy of the foregoing document via first class mail or e-mail on:

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Daniel G. Kruger